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Eighth Circuit Upholds FCC's Vonage Decision

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On March 21, 2007, the Court of Appeals for the Eighth Circuit upheld the FCC's 2004 *Vonage Decision*, which preempted state regulation of interconnected VoIP calling services, including Vonage's DigitalVoice offering.

Throughout its opinion, the Court relied heavily on the fact that VoIP services are tied to no particular or readily identifiable geographic location. As a result, the FCC reasonably found that it was "impossible" or at least "impracticable" to separate the intrastate and interstate components of VoIP-based calls.

The Court recognized a distinction between "nomadic" VoIP services, such as Vonage's DigitalVoice, and "fixed" VoIP services, such as those provided by some cable operators. The Court noted that the analysis that it applied to uphold the FCC's preemption of state regulation of nomadic VoIP services like Vonage's (i.e., the inability to separate the intrastate and interstate components) may not apply to fixed VoIP services, but the Court concluded that it need not decide that question in this case.

In addition, the Court noted the narrowness of its holding, emphasizing that the FCC's action in the *Vonage Decision* was reasonable based on the record it had at the time, and allowed that new technology could make it practicable to identify the geographic location of a VoIP caller. In such an instance, the Court suggested that the "impossibility exception" relied upon by the Commission to preempt the states may need to "be reexamined."

The Court also found that in the *Vonage Decision* the FCC reasonably avoided determining whether interconnected VoIP service should be classified as a "telecommunications service" or an "information service." Noting the principle that "decisionmakers sometimes dodge hard questions where easier ones are dispositive," the Court concluded that the FCC's reliance on the "impossibility exception" was sufficient.

As an interesting side note, in the opening sentence of the opinion, the Court styled the FCC's *Vonage Decision* as "preempting state regulation of telecommunication services which utilize" VoIP (emphasis added). Whether this dictum by the Court was a Freudian slip or a harbinger of things to come is anyone's guess.

If you have any questions or would like additional information, please contact Michael B. Hazzard (202) 857-4540) or Ross Buntrock (202) 857-4479 or any other Womble Carlyle communications attorney. Also, be sure to check out our Commlaw Source blog: <http://wombletelecomm.blogspot.com/>.

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